IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1613 OF 2004

Hafiz Aziz Choudhary .. Petitioner

V/s

The State of Maharashtra & ors. .. Respondents

Mr. N.B. Pawaskar for the Petitioner.

Ms. P.H. Kantharia, A.P.P. for Respondents Nos.1 and 2.

Mr. Sayaji Nangre for Respondent No.3.

CORAM : H.L. GOKHALE &
Smt.V.K. Tahilramani, JJ.

DATE : 17TH AUGUST 2004

P.C. :

1. Rule. Heard Mr. Pawaskar in support of this petition. Ms.Kantharia, A.P.P. appears for Respondents Nos.1 and 2. Mr.Nangre appears for Respondent No.3.

2. This petition is filed by a young man of 24 years contending that he has married the daughter of Respondent No.3 by name Lubna, and that in spite of that a charge of kidnapping has come to be registered against him under C.R. No.114 of 2004 at the Mumbra Police Station. He, in fact, seeks a registration of an offence against Respondent No.3,

father of the girl Lubna, for wrongful detention of Lubna, and then through prayer (c) he seeks a direction to the Senior Inspector of Police, Mumbra Police Station and Respondent No.3 to produce the girl before the Court.

3. The Respondent No.3 has filed a reply and has placed on record his version of the relationship between the Petitioner and his daughter.

4. As far as the Petitioner is concerned, it is his case that he and this Lubna were got attracted to each other and on two earlier occasions went out of Mumbai on their own volition. This happened on 19th March 2004 and then again on 14th April 2004. On both these occasions, Lubna accompanied the Petitioner on her own and came back. It is the case of the Petitioner that in fact the Petitioner and Lubna were to be married, but for some reason or the other because of the pressure brought from the family of Respondent No.3 that the marriage could not take place. It is his further case that ultimately a nikah was performed on 27th June 2004 and that is how thereafter they had gone out of Mumbai and had stayed together. In the meanwhile, a C.R. has come to be registered against him for kidnapping Lubna. It is his case that she had come with him on her own volition and had got married and also that she is a major in age and for that purpose relies upon

a medical certificate given by the Civil Hospital at Thane. He, therefore, submits that the C.R. registered against him be quashed and set aside and Lubna, whom he claims to be his wife, be restored to him.

5. The Respondent No.3 has filed a reply and has contended that Lubna is a minor. She is born on 1st July 1988. He has relied upon the school certificates given from various schools wherein she studied in Muradabad, U.P. As also a bonafide certificate given by the Junior College where she has been studying in Mumbra. It is his case that she has been kidnapped by the Petitioner and, therefore, the charge was correctly registered against the Petitioner. As against that, the Petitioner submits that all these certificates are of recent date and therefore they should not be relied upon. Therefore, in our view, it would be advisable to rely on the medical opinion only, both of which clearly place her age in any case above 17 years.

6. Since this is a case of a young boy and still younger girl, we asked Respondent No.3 to keep his daughter present in Court. We interviewed her as also the Petitioner in our chamber. The daughter of Respondent No.3 Lubna has disputed her marriage with the Petitioner. She

however did not dispute that she had gone with him on three different occasions on her own volition. She has expressed her desire to continue to remain with her parents only.

7. This being the position, in our view, there is no occasion to maintain the charge of kidnapping against the Petitioner. Mr.Pawaskar for the Petitioner has relied upon a judgment of the Apex Court in **S. Varadarajan v. State of Madras - AIR 1965 SC 942**, where a girl on her own volition goes with another boy even though she may be a minor, it is held that it will not constitute kidnapping. This is of course provided she must be in a position to form her own opinion and she must have attained the age of discretion. In the present case, the facts are similar. It is very clear that the daughter of Respondent No.3 had gone on her own volition with the Petitioner. This being the position, the case for kidnapping is not made out. We, therefore, grant prayer (a) and quash the F.I.R. under C.R. No.114 of 2004 registered with Mumbra Police Station. The police will, therefore, take no action against the Petitioner any more.

8. There is one more facet of this matter. The police have added the charge under section 376 of IPC

subsequently. As far as this charge is concerned, even according to the police record and the medical examination conducted by the police, her age is 17+. In her own deposition given to the police on 3rd July 2004, she has given her age as 19. In that she has stated that she had fallen in love with the Petitioner and then married with the Petitioner. In a situation like this, when her age is above 16 years as per the medical record and according to her own statement and when on her own volition she stayed with the Petitioner, a charge under section 376 IPC is not sustainable. The same is also quashed.

9. As far as restoring the custody of Lubna to the Petitioner is concerned, there is a dispute about the marriage between the two. Lubna has also stated that she would like to remain with her parents. That being so, no order can be passed against her wishes. There is a disputed question of fact as to whether such a marriage did take place. This being the position, we cannot grant the other prayer in this petition, namely that the custody of Lubna be handed over to the Petitioner.

10. Rule made absolute in part as above.

11. Authenticated copy of this order be made available to the parties.

(H.L. GOKHALE, J.)

(SMT. V.K. TAHILRAMANI, J.)